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Show Cause Motion

In the Court of Appeal for Ontario.

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IN THE MATTER OF AN APPLICATION BEFORE THE ONTARIO RAILWAY AND MUNICIPAL BOARD.

BETWEEN

THE CORPORATION OF THE CITY OF TORONTO,

(Applicants) APPELLANTS

AND

THE TORONTO RAILWAY COMPANY,

(Respondents) RESPONDENTS.

APPEAL BOOK.

MR. W. C. CHISHOLM,

Solicitor for Appellants.

MESSRS. McCARTHY, OSLER, [illegible] & HARCOURT,

Solicitors for Respondents.

Thursday Nov 16th subject to argument from 2 p.m. to 4.00 p.m. moved H.T.

1908 Jan 22nd Judgment dismissing appeal - with

TORONTO
CHARLES ROSS, PRINTER, 44 AND 46 LOMBARD STREET.
1907.

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UNIVERSITY OF TORONTO

In the Court of Appeal for Ontario.

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TORONTO
CHARLES RODDY, PRINTER, 44 AND 46 LOMBARD STREET,
1907

6586

Langelaff v Doremus
open to the inference that what
was done was illegally done

Pleading:
Aff. if Pltff. suffered any
damage it was by the act of Ry. Co.
The Court finds

Answer to agreement
entered into for a consideration
and brought Mer rights

These 10 miles require the greater
Removal

The snow much lie where cleared
to till an opportunity to Civil
Engineers to Examine

Spread empties existence in circle
before that

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IN THE COURT OF APPEAL FOR ONTARIO.

IN THE MATTER OF AN APPLICATION BEFORE THE ONTARIO RAILWAY AND MUNICIPAL BOARD.

BETWEEN—

THE CORPORATION OF THE CITY OF TORONTO,

(*Applicants*) APPELLANTS

AND

THE TORONTO RAILWAY COMPANY,

(*Respondents*) RESPONDENTS

STATEMENT OF CASE.

This is an Appeal from the Order of the Ontario Railway and Municipal Board, bearing date the twenty-third day of April, 1907, whereby the said Board dismissed the application of the above-named Appellants.

The Ontario Railway and Municipal Board.

BETWEEN

THE CORPORATION OF THE CITY OF TORONTO,

Applicants,

AND

THE TORONTO RAILWAY COMPANY,

Respondents.

NOTICE OF APPLICATION.

(Snow removal and non-completion of routes.)

1. The applicants are a municipal corporation.

2. The respondents are a street railway company carrying on business and having their head office at the City of Toronto.

3. Under and by virtue of an Agreement dated the first day of September, 1891, made between the applicants and George W. Kiely and others, and the statute 55 Victoria, Chapter 99, validating the said Agreement, the respondents were granted the exclusive right to operate surface street railways in the said City of Toronto, and they are bound by the said Agreement and statute to carry into effect, perform and fulfil all the provisions and stipulations contained in the award, conditions, tender and by-law attached to the said Agreement.

4. Paragraphs numbers 21 and 22 of the conditions attached to the said Agreement as interpreted by Section 25 of the said statute, provide that the respondents shall not deposit snow, ice or other material upon any street, square, highway or other public place in the City of Toronto without having first obtained the permission of the City Engineer of the said city, or the person acting as such. Since the beginning of the present winter, and without having obtained the permission of the said City Engineer, and in spite of his orders to the contrary, the respondents have deposited and continue to deposit snow, ice and other material upon the sides of the streets upon which their tracks are laid.

5. The said conditions and Agreement also provide that the speed and service necessary on each main line, part of same, or branch, is to be determined by the City Engineer and approved by the City Council, and also that day cars are to commence running on all routes not later than 5.30 a.m. and to run until 12 o'clock midnight at such intervals as the City Engineer, with the approval of the City Council, may from time to time determine. The respondents have, in violation of their obligations under the said Agreement, conditions and statute, turned

4. depositing sweet

certain of their cars started upon a route without completing the same and continue so to do, and compel and have compelled the passengers thereon to get out of the car in which the said passengers were travelling, to the great inconvenience of the said passengers.

6. The applicants ask that the respondents be ordered to desist from their violation of the Agreement by throwing snow, ice and other material upon the streets, without the permission of the City Engineer, and that the respondents be compelled to run each of their cars conveying passengers to the end of its route.

7. This application will be heard by the Board after ten days from the service hereof, or earlier, as the Board may appoint, at such time and place and in such manner as the Board may order and direct.

8. This notice is given by William Craig Chisholm, of the City of Toronto, in the County of York, solicitor for the applicants.

Dated this 30th day of January, A.D. 1907.

W. C. CHISHOLM,

Solicitor for Applicants.

6. Beordersblad

REPLY.

1. The respondents say that the brushing by the sweeper of snow from their tracks to the sides of the streets upon which such tracks are laid is not depositing snow upon such streets within the meaning of Clauses 21 and 22 of the Agreement in the Notice of Application referred to, as interpreted by 55 Vic. Cap. 99, Sec. 25.

2. In reply to paragraph 5 of the said Notice of Application, the respondents say that the questions therein raised are involved in litigation now pending before His Majesty's Privy Council.

3. The respondents further say that the right to alter the destination of individual cars when occasion may demand in the public interest and for the public service, is inherent in the right of management, and has never been exercised unreasonably, and ought not to be interfered with.

DELIVERED this 27th day of February, 1907, by McCarthy, Osler, Hoskin & Harcourt, of the City of Toronto, solicitors for the respondents.

1. Breaking ink depositing

PARTICULARS.

The applicants offer the following particulars as required under order of the Board, made on the 12th day of February, 1907.

1. Snow was removed from the street car tracks by respondents' electric sweepers on the following dates:

December 6th, 1906.
January 12th, 1907.
January 25th, 1907.
February 21st, 1907.

2. The applicants have no record in their office of the depth of snow that fell on the above mentioned dates.

Dated this 21st day of February, 1907.

W. C. CHISHOLM,
Applicants' Solicitor.

PROCEEDINGS BEFORE THE BOARD.

THE ONTARIO RAILWAY AND MUNICIPAL BOARD.

BETWEEN

THE MUNICIPAL CORPORATION OF THE CITY OF TORONTO,

Applicants,

AND

THE TORONTO RAILWAY COMPANY,

Respondents.

Hearing Monday, April 8th, A.D. 1907, at 2.30 p.m.

PRESENT:

JAMES LEITCH, Esq., K.C., Chairman.
ANDREW J. INGRAM, Esq., Vice-Chairman.
J. S. FULLERTON, Esq., K.C., and MR. JOHNSTON, Counsel for the Applicants.
H. S. OSLER, Esq., K.C., Counsel for the Respondents.

MR. FULLERTON—The present application divides itself into two parts; one in regard to the snow removal, the use of the snow sweeper by the street railway, and the other in regard to the turning of cars before they get to the end of their routes.

MR. OSLER—I don't remember that that is so, but—.

MR. FULLERTON—Perhaps what I am going to say will suit you. It is so intimately associated with the question of routes, that while I think that I could distinguish it from the other, still I think probably, as it must be near the time of judgment being given by the Privy Council, it might stand until that judgment be given, if my learned friend does not object to that course. I purpose to take the first part up to-day.

MR. OSLER—I think that much more convenient.

MR. FULLERTON—As to the other, I think I did mention to your Honors the basis of my argument, but perhaps I better state again in opening what the difficulty is. By section 21 of the conditions between the company and the city, it is provided: "That the track allowances (as hereinafter specified), whether for a single or double line, shall be kept free from snow and ice at the expense of the purchaser, so that the cars may be used continuously." Then clause 22: "If the fall of snow is less than six inches at any one time the purchaser must remove the same from the tracks and spaces hereinafter defined, and shall, if the City Engineer so directs, evenly spread the snow on the adjoining portions of the roadway; but should the quantity of snow or ice, etc., at any time exceed six inches in depth, the whole space occupied as track allowances (viz., for double tracks sixteen feet six inches, and for single tracks eight feet three

inches), shall, if the City Engineer so directs, be at once cleared of snow and ice, and the said material removed and deposited at such point or points on or off the street as may be ordered by the City Engineer." Now that second clause, perhaps, admits of some argument as to what it means. When the agreement came before the Legislature, by section 25 of the Act (you will find it on page 11 in your book) the Legislature enacted, "Whereas doubts have arisen as to the construction and effect of sections 21 and 22 of the said conditions, it is hereby declared and enacted that the said company shall not deposit snow or ice or other material upon any street, square, highway, or other public place in the City of Toronto, without having first obtained the permission of the City Engineer of the said city, or the person acting as such."

CHAIRMAN—Will section 25 apply to snow less than six inches in depth?

MR. FULLERTON—I think so.

CHAIRMAN—That is your contention.

MR. FULLERTON—"It is hereby enacted that the company shall not deposit snow, ice or other material upon any street, square, highway, or public place in the City of Toronto, without having first obtained the permission of the City Engineer."

CHAIRMAN—Your contention is that, under section 25, the street upon which the tracks are laid, and upon which the snow falls, cannot be used to deposit even the snow swept off by the sweeper.

MR. FULLERTON—There are no limiting words, and I should have thought that it was without doubt, if it was not for my learned friend's pleadings.

MR. OSLER—I thought that it was the other way.

MR. FULLERTON—Subsequently an agreement was entered into—.

MR. OSLER—The agreement printed in this book dealing with the removal of snow and ice has been cancelled, and I do not think that it should be considered.

MR. FULLERTON—I simply wanted to point out the facts.

CHAIRMAN—You can go on.

MR. FULLERTON—I got as far as an agreement was entered into. That agreement deals with the handling of snow and ice on the streets, and it has been cancelled.

MR. OSLER—My objection is to going into an agreement that has been cancelled.

MR. FULLERTON—I propose to put in that agreement for this reason. The agreement shows the interpretation put on the statute and condition by the different parties. It deals with these very sections. It tells when the sweepers shall be used and when not. It is subsequently cancelled. I propose to show that cancellation. Under the agreement there was the permission of the City Engineer to be obtained. The agreement entered into by the city, by the consent and on the advice of the City Engineer, is cancelled. Subsequent to the time it was in force, during the remainder of the time since, during last winter, the company went on using the sweeper without any permission, and continued as long as they saw fit. Now what we say is that they have no right to use the sweeper.

CHAIRMAN—Your rights are within the four corners of sections 21 and 22 of the conditions and the 25th section of the Act.

MR. FULLERTON—Our rights are in that. I propose to put in that agreement for nothing except for the direct purpose of showing the facts. I don't think that it would help your Honors otherwise. I propose to hand in its cancellation as well.

MR. OSLER—My objection, your Honors, is this. My contention is that the agreement cannot be evidence of the interpretation based on the statute made by the parties interested. In other words, it is valueless for the purpose of showing any interpretation put on the agreement, upon the original agreement and on the statute by the parties. Now, I am not sure but that my learned friend, perhaps, can attain the same object in another way. I am not prepared to say, and in the meantime not prepared to argue, that correspondence passing between the

parties may not show what view they then took of the matter; but the moment any objection arose, say over the payment of a certain portion of the removal of this snow, then one would know their views. Now, it is quite obvious that persons might agree to divide the cost of the work without there being any admission as to their rights. Now, so far as using the sweepers is concerned, my learned friend takes an entirely different view from me as to the object of giving permission to use the sweeper. There is no object to be gained, except this, that without permission—the fact is that the company takes its own risk. I don't know how far, except with the express permission of the city, the use of the sweeper by the company would be held to be excused. It is quite possible that if an accident happened it would be blamed on to the use of the sweeper. A horse might be frightened. It might be said that the company had no right to use the sweeper under the charter. It was not given them, so that they would be liable, if they had no express instructions to use it. I am not here contending, at the present moment, what instruments we have the right to use in order to remove snow from the tracks. We have the right, where the snowfall is less than six inches, to take that snow from our tracks, putting it aside over the rest of the street and roadway.

CHAIRMAN—In the first place, you start out with this. If the fall of snow is less than six inches, you shall remove the same from your tracks.

MR. OSLER—You could stop there We are also bound, if the City Engineer so directs, to evenly spread it on the road.

CHAIRMAN—Just wait until I look at section 25.

MR. OSLER—I would rather look at 22. Perhaps I better make my argument plain.

CHAIRMAN—I should not interrupt.

MR. OSLER—That is all right. Should the quantity exceed six inches in depth, should the fall of snow at any one time exceed six inches in depth, the whole space occupied as track allowances (viz., for double tracks, sixteen feet six inches, and for single tracks eight feet three inches), shall, if the City Engineer so directs, be at once cleared of snow and ice and the said material removed and deposited at such point or points on or off the street as may be ordered by the City Engineer.

CHAIRMAN—In the second contingency, where it is more than six inches, unless the City Engineer directs you, you could not clear it off at all.

MR. OSLER—The two conditions are: if it is less than six inches, we have to spread it evenly over the road; if it is more than six inches, if the City Engineer directs, it is to be removed and deposited elsewhere, to the point or points that he directs. Now, the words applied by the agreement to the taking away, the removal and the depositing, are entirely with regard to material taken away and deposited in other places, not the spreading of it on the adjoining portions of the road. Only where there is a fall of more than six inches must we take it away. Now, your Honors will see the nature of the agreement. The difficulty of that clause, as it stands there, is that there may be, during the course of two or three weeks, there may be six falls of snow, no one more than two inches, but together they might amount to a considerable fall of snow. There is no power to compel the railway company to take away any of it, unless the fall of snow is more than six inches at one time. There is nothing to compel the railway to take it away. Now look at section 25. The company shall not deposit snow or ice upon any street, square, highway, or other public place in the City of Toronto, without having first obtained the permission of the City Engineer. Can that mean anything less, was it intended to mean anything else, than the interpretation of that part of clause 22, where it deals with the depositing of snow and ice.

CHAIRMAN—That is the second contingency provided for in that clause, where it is more than six inches.

MR. OSLER—Yes, sir. If the City Engineer directs, then we must take and deposit it at such a point or points as may be ordered by the City Engineer. One might suppose that the direction of the City Engineer to deposit it at a point would be equivalent to the permission of the City Engineer, or the person acting as such. However that may be, the express thing of section 25 is the depositing elsewhere. I protest entirely against my learned friend using the generality of the word deposit. There is no doubt, in one sense, that if I shove a piece of paper over six inches, I deposit it in another place; but where you get an agreement confirmed by the city, in which two sets, two distinct things, are described, the removal of the snow from the tracks, and, if directed, the spreading of it on the adjoining parts of the road, and where we have to remove it from the streets and deposit it in another place, surely it cannot be held that—.

MR. FULLERTON—Are you not going into what you objected to.

MR. OSLER—I am making plain the interpretation of the statute. That being the point, how can any agreement that was made, being an agreement dividing up the cost of the work, and being an agreement giving permission, as my learned friend knows, to use an electric sweeper—how can that possibly be used in the interpretation of the statute. There is an agreement. That must mean that somebody is giving something to somebody, paying something to somebody. The very fact that an agreement has been entered into at all is the best possible evidence of a consideration. If we simply said, if we met together, and said, Well now, it is doubtful what is the interpretation of this agreement; we will do so and so. Clearly that would be evidence showing the interpretation placed on it. If correspondence passed between the parties, as there was—.

CHAIRMAN—That could be let in as a surrounding circumstance.

MR. OSLER—Quite so. If your Honor will look at the agreement, it is an agreement to do something for a consideration. That removes it from being evidence.

MR. FULLERTON—The admission that my learned friend makes in the strenuousness of his argument is this, that the agreement does indicate something, therefore it indicates something that he does not want to have before your Honors. Now, the parties have chosen to put in recitals. They have chosen to set out the consideration and enter into an agreement, the contents of which are before you; the elaboration of which I need not go into here. With the view of arriving at the meaning of the statute, I thought the agreement to be a surrounding circumstance that would assist your Honors in dealing with this matter. It is something added to the knowledge that we can lay before you. My learned friend has gone into the statute which I thought that I would leave until the close of the case; however, I will consider it now, and hope that it will not be necessary to touch it in closing. Now, take the statute. It seems to me that it is clear. I mean the agreement, clauses 21 and 22, with the aid of the statute, is undoubtedly clear. "The track allowances (as hereinafter specified) shall be kept free from snow and ice at the expense of the purchaser, so that the cars can be used continuously." If you stop there, it is perfectly clear that the tracks must be kept clear. There is not a word there that says that you can throw it over in front of carriages and of wagons, where they run, and obstruct these vehicles. Take the statute alone. Besides, I would say that the prohibition arose at common law. Now, passing down to 22: "If the fall of snow is less than six inches at any one time, the purchaser must remove the same from the tracks and spaces hereinafter defined, and shall, if the City Engineer so directs, evenly spread the snow on the adjoining portions of the roadway." Now, stopping at that, first the company is bound to remove the snow from the tracks. Then this privilege is given to the City Engineer. He can say: "You cannot remove that snow off the street, as we need snow there for sleighs; I direct you not to carry it away, but to spread it evenly on either side of the track." There are two things, one a prohibition to keep snow off the tracks, and the other is not to take it away

from the street, but to deposit it on the sides of it, to aid sleighing. That is the construction that I think that admits of. That makes this thing plain.

MR. INGRAM—If the company were using the sweeper, and if the City Engineer thought that the snow would not interfere with the traffic, or it would not require levelling off, he would simply refrain from saying anything about it?

MR. FULLERTON—That would not be a direction. It is only when he directs that they can remove it on the sides of their tracks. If he does not direct this, they are bound to take it away.

MR. INGRAM—Then the company could not use the sweeper?

MR. FULLERTON—No.

MR. OSLER—This is a new argument. They must evenly spread it.

MR. FULLERTON—If the City Engineer so directs. It can only be done on his direction.

MR. OSLER—Well, it must be there before it can be spread.

MR. FULLERTON—Throwing the snow off and spreading it are two different propositions. Then if "The quantity of snow or ice at any time exceed six inches in depth, the whole space occupied as track allowances shall, if the City Engineer so directs, be at once cleared of snow and ice, and the said material removed and deposited at such point or points on or off the street as may be ordered by the City Engineer." In the first place, they take it off the tracks. In the second place, he directs where it shall be placed. Now then, when you go to section 25, it says: "Whereas doubts have arisen as to the construction and effect of 21 and 22 of the said conditions, it is hereby declared and enacted that the said company shall not deposit snow, ice or other material upon any street, square, highway or other public place in the City of Toronto, without having first obtained the permission of the City Engineer."

MR. INGRAM—Does that mean deposit it by sweeper or by drawing it away?

MR. FULLERTON—At the time that this was enacted, the sweeper was an unknown thing. This was about the first electric railway constructed. There was one before it in the north of Ireland, and one near St. Catharines. Sweepers came in after that. There was no contemplation of sweepers at the time that this was drawn, so that could make no difference. Take my learned friend's illustration. Take a piece of paper—.

MR. OSLER—Excuse the interruption. The sweeper was in use long before this company was incorporated.

CHAIRMAN—I think that section 22 was put in having the snow plow in view.

MR. OSLER—It looks more like a snow plow.

MR. FULLERTON—The thing that they used then was a plow. It is broad enough to include a plow.

MR. OSLER—You must remember the horse sweeper. I remember it. Whether it was before or after—.

MR. FULLERTON—If so, it makes the conclusion all the stronger. There was a case which came up in the Supreme Court which might help us some. It was tried in 1895, and reported in the reports of that year.

MR. OSLER—What case is it?

MR. FULLERTON—Toronto v. Toronto Railway Company, 24 S. C. R. 589; and I think the remarks made by Justice Gwynne give us some little aid in considering this. A man named Langstaff—.

CHAIRMAN—What is the case?

MR. FULLERTON—Toronto v. Toronto Railway Company. The Toronto Railway Company was brought in as a third party. Langstaff succeeded against the City of Toronto, and Toronto wanted to recover against the Toronto Railway Company. It is really the city and the company against Langstaff, but it is reported under the head of Toronto against Toronto

Railway Company. The snow had been thrown off the tracks, until along Queen Street a trench of considerable depth had been formed by piling up the snow. Langstaff driving along in his carriage, slipped into it and sustained injury. (Mr. Fullerton here reads from the case that he is citing). I call your Honors' attention to the fact that Judge Gwynne says nothing about six inches or any depth. I worked the case up. I think that it was the first for the City of Toronto that I argued in the Supreme Court. (Mr. Fullerton continues reading the case under discussion.)

MR. OSLER—What was the date of this case?

MR. FULLERTON—It was argued in 1895 in the Supreme Court.

MR. OSLER—It would be tried in 1892 or 1893 here.

MR. FULLERTON—About that date. I do not remember exactly. Let me point out the difficulty that we have to contend with. The smallest removal is just as serious as a large one. A fall of two inches or four inches, or where there comes a big snowfall, the trouble becomes just as great. The snow is thrown from the tracks towards the sidewalks. It becomes pounded down hard. It increases in height three, five, eight, ten inches, until in this case the snow was twenty inches high. It is a matter of little difference whether what was put there be a small snowfall or be a large one. Now, the parties making that agreement knew that condition as well as we do. There it is printed, that the Engineer could direct the spreading of it evenly; but without his direction they could not put it there at all. If there was a fall of six inches, that must be removed. We find that the city steps in and says that no snow shall be put there. It must be kept clear. Now that being so, I submit that they are in the same position exactly, no matter what the snowfall may be. I am making the argument, and I hope that I will not have to go through it again. It seems to me that this cancelled agreement, this act of the parties dealing with the very question I am dealing with, is very strong evidence. I therefore tender that agreement.

MR. OSLER—This must be something, the parties in the original agreement, as a matter of policy, would not have made. By this other agreement that might be so, but when this agreement was made they were entirely altering the dealing with the streets. Before this agreement was made, if there was a considerable fall of snow, the cars were taken off and buses put on.

MR. FULLERTON—I must say—.

MR. OSLER—I am giving evidence, excuse me. I remember distinctly before this electric railway had this arrangement, and the system was blocked by a fall of snow, the cars were taken off the tracks and sleighs and then buses were put on.

MR. FULLERTON—Will my learned friend allow me to interrupt him?

MR. OSLER—Certainly.

MR. FULLERTON—In the early times they would shovel the snow off the tracks, and then it would be thrown back on them again.

CHAIRMAN—I remember when the merchants would shovel it back again as fast as the railway men would shovel it off the tracks.

MR. FULLERTON—You and I were students then. When it got too deep, the merchants would just shovel it back.

MR. OSLER—Quite so. Immediately prior to the electric railway there were buses on the street.

MR. FULLERTON—There were fights and rows on account of throwing the snow back on the streets. The policemen had to interfere.

CHAIRMAN—You may put in the cancelled agreement and the letter cancelling it.

MR. OSLER—Your Honor has not decided that it has any bearing on it?

CHAIRMAN—We will have to find the interpretation between the four corners of conditions 21 and 22 of the agreement between the company and the city, and section 25 of the statute.

CHARLES H. RUST (*Examination and Cross-Examination*).

MR. FULLERTON—I don't propose to read the agreement. I am handing in a printed copy of it.

CHAIRMAN—Is there any need to do that? It is printed on page 45. However, perhaps you better do so.

MR. FULLERTON—For fear the papers should ever be wanted. Then I put in the cancellation of this agreement. His Worship, Mayor Coatsworth, received a notice as follows:

"Toronto, Oct. 1st, 1906.

"HIS WORSHIP MAYOR COATSWORTH,

"City Hall, Toronto.

"Dear Sir,—The Toronto Railway Company hereby give notice of the cancellation of the "agreement between the company and the Corporation of the City of Toronto, dated the 19th "day of February, 1897, being an agreement relating to the removal of snow and ice, and other "matters, such cancellation to become effective upon the expiration of thirty days after the "receipt of this letter.

"This notice is given pursuant to paragraph 8 of the said agreement, which provides that "the same shall be operative until 30 days' written notice shall be given by the Corporation or "the company during any year before the 1st day of November for the cancellation thereof.

"I shall be glad to take up with you, or with any duly authorized representative of the Cor- "poration, any questions that may arise in consequence of the cancellation of the said contract "as above stated, or, if the city prefers, as to any questions which may come within the jurisdic- "tion of the Railway Commission, I shall be glad to discuss the same before the Commission."

Agreement put in, marked Exhibit 1A.

Letter put in, marked Exhibit 2A.

CHAIRMAN—The letter is from the company to the Corporation.

MR. FULLERTON—Yes. It is signed Robert J. Fleming. Then it is not contended that any permission to use the sweeper has been given to you since, Mr. Osler.

MR. OSLER—No, I do not think so.

MR. FULLERTON—I was going to call some witnesses, but I am informed that there has not been a fall of six inches this winter at any one time. There is no doubt that you used the sweeper all winter?

MR. OSLER—Just wait a minute. We will admit it for the purpose of this case. We used the sweeper.

MR. FULLERTON—Without any formal leave.

MR. OSLER—Yes. I don't want to say anything that will excuse you from putting Mr. Rust in the box formally, so that I can cross-examine him.

CHARLES H. RUST called and sworn, to MR. FULLERTON:—

Q.—Have you given any permission to the Street Railway Company other than this cancelled agreement for the use of the sweepers to remove snow? A.—No.

CHARLES H. RUST, cross-examined by MR. OSLER:—

Q.—Mr. Rust, when did you enter the service of the city? A.—1877.

Q.—1877. Then you were there long before this company was formed? A.—Yes.

CHARLES H. RUST (*cross-examination and re-examination*)

Q.—What is your recollection of the practice of removing snow, when it was removed from the immediate tracks, towards the end of the old company? A.—Previous to the new company being formed, you mean?

MR. FULLERTON—I object, that cannot be evidence.

MR. OSLER—These are the circumstances that were in existence at the time that this agreement was made? A.—My recollection is that this snow was removed by plows.

Q.—Casting it up on either side of the tracks? A.—Yes. Sometimes it was removed. On Yonge Street generally rows took place, and in the spring they put on buses.

Q.—Buses, when there was no sleighing, or sleighs as well as buses? A.—Yes.

Q.—Was it ever taken up, and taken away in carts and put on side streets? A.—I have a very faint recollection of that. Once or twice some snow was removed that way. I am not very positive about it.

Q.—It was taken up and put on side streets? A.—Yes.

Q.—Now the accumulated ice in the spring, was that put on the side streets? A.—I don't think that that was taken away at all.

Q.—At the time that the buses were put on, was it not taken away then? A.—Some was removed then I think.

Q.—Now, take the practice in the early days of this company. What was done then this agreement was entered into? You were second in command? A.—Yes.

You were assistant Engineer? A.—Yes.

FULLERTON—I thought that you were in the sewer department at that time? A.—No, in . was City Engineer.

Q.—What was the practice then? A.—It seems to me that we were constantly having rows.

Q.—Do you remember the horse sweeper? A.—I am not sure that I do.

Q.—It was quite a striking sight to see sixteen or eighteen horses drawing the snow along the streets? A.—I don't think that I do remember that. Mr. Nix, no doubt, could tell you about that. I cannot say that I recollect those horses. Perhaps it is correct. Mr. Nix would know all about it. Now I have no recollection of it.

Q.—Speaking of rows, were not the rows with regard to the sweeping of the snow on the sidewalks, and the crossings being blocked? A.—Now I think that it started with the piling up of the snow on the streets. The teamsters combined and then there was trouble.

Q.—What distance, what is the distance between the tracks and the curb? A.—It varies. The track allowances range from eight feet to sixteen, and the distance between the tracks and the curb ranges from fourteen feet. All the snow from half the track allowance had to go on each side, and that caused the trouble. Of course there were some streets where there was no trouble; snow was all put on the boulevards.

Q.—The trouble was in the central part of the city? A.—In the business part of the city, not in the upper part.

Q.—You have no personal recollection of the correspondence that passed at that time I suppose? A.—No, I have not.

Q.—Do you remember this, that there was a good deal of objection which, perhaps, grew as the years went on, from merchants and other people living on side streets, against the snow being taken from the business streets and dumped on their streets? A.—Yes.

Q.—That has been a sore trouble? A -Yes.

Q.—It is worse in the spring. It makes so much more mud? A.—Yes.

CHARLES H. RUST (*cross-examination and re-examination*).

Q.—I suppose that that has always been an awkward feature in the Engineer's Department? A.—It is rather awkward where there is no dump handy.

Q.—No one likes to have it dumped in front of his house? A.—Certainly not.

Q.—Have complaints been made to you? A.—Yes.

Q.—Have any proceedings been taken against you on account of this? A.—I don't know about that.

Q.—That is all.

CHARLES H. RUST re-examined by MR. FULLERTON:—

Q.—Do you remember the clauses in the old agreement about the snow removal? A.—In the old agreement?

Q.—Yes. A.—I don't recollect any.

Q.—You don't? A.—My recollection is that when the snow was more than six inches they had to put on sleighs.

MR. FULLERTON—Then perhaps either this evidence should be rejected or the agreement put in as an exhibit.

MR. OSLER—That was the only practice, the putting on of sleighs. You don't know what is spoken of in that old agreement? A.—I can only think of the one clause.

MR. OSLER—And that is that when there was more than six inches sleighs were put on? A.—Yes.

MR. FULLERTON—You don't pretend to give the clause exactly? A.—No.

MR. FULLERTON—I am quite willing to put the agreement in.

MR. OSLER—So am I.

MR. FULLERTON—We want to get the facts.

MR. OSLER—I should think that the old agreement is a fact, being one of the circumstances that existed when this agreement was entered into. That seems to me to be the case.

MR. FULLERTON—I have not got the agreement here, but I can get it.

MR. OSLER—You can. I don't object to it.

(Mr. Fullerton resumes the examination of Mr. Rust.)

Q.—Now, speaking of Queen Street and King Street, where the sidewalk goes out from the buildings to the curb, what portion will that give you of the hundred miles of street railway that you have in the city? A.—Two or three miles.

MR. OSLER—Twice that, for they are double tracks.

MR. RUST—Then on Yonge Street there is a wide sidewalk.

MR. FULLERTON—The wide sidewalk goes up to College? A.—No; away beyond Bloor.

MR. FULLERTON—There is about a mile and a half on Yonge Street.

MR. OSLER—On Front Street there is a wide sidewalk.

MR. RUST—There is nine or ten miles of double track where the sidewalk runs out to the curb.

MR. FULLERTON—The rest is all boulevard? A.—Yes, sir.

MR. FULLERTON—I think that that is all.

MR. OSLER—Then that is your case, is it?

MR. FULLERTON—Your recollection is that the snow was taken away by carts before the present railway company made this agreement?

MR. RUST—I think so, part of it. (Examination of Mr. Rust concluded.)

Boulevards + wide sidewalks

WILLIAM NIX (*examination*).

MR. OSLER—I might have given my learned friend notice to produce, and I would have done so, only I thought that we had the correspondence relating to this. However, there is a letter that we have not got, and I would ask my learned friend to produce it. It is dated December 10th, 1892, from the City Engineer to the Toronto Railway Company.

MR. FULLERTON—We have not got the original, but I shall endeavor to get you a copy.

WILLIAM NIX called, and sworn, to MR. OSLER:—

Q.—You are road master? A.—Yes.

Q.—What was your position with the old company? A.—I had charge of the one horse department.

Q.—MR. FULLERTON—On the whole line? A.—The one horse system. It was divided into two systems.

Q.—MR. OSLER—Now, what is your recollection of the practice of removing snow from the tracks before this company had charge? A.—Before the present company was formed the system of removing the snow in those days was by snow plows or mould boards.

MR. FULLERTON—I object to the evidence given under the old agreement.

MR. OSLER—It was the practice.

CHAIRMAN—You want to find out what was done irrespective of any agreement?

MR. FULLERTON—The clauses of this old agreement are not before you.

MR. OSLER—I agree that this evidence is to be in connection with these clauses.

(Mr. Osler resumes the examination of Mr. Nix.)

Q.—A mould board was used, you say? A.—A mould board was drawn by horses, and in addition to that we had two sweepers, each drawn by eight teams of horses.

Q.—Eight teams of horses. Did you use a team of white horses? A.—Yes, white and grey horses, and the sweepers used to be loaded with sand barrels to balance them.

Q.—Thank you. I just wanted to see if I remembered correctly. You had two sweepers? A.—Yes, sir. I can produce the very men that drove them, if necessary.

Q.—So the use of these sweepers was continued by the new company? A.—Until the conversion of it into an electric system.

Q.—Until the system was converted into an electric one, these were used? A.—Yes.

Q.—For two or three years after the commencement of this company? A.—Yes, two or three years.

Q.—I suppose that this company purchased these sweepers from the city? A.—Yes.

Q.—And the horses too? A.—Yes, sir.

CHAIRMAN—Did you use the same kind of plows? A.—Yes, just the same kind of plows.

Q.—I suppose that there was no change until the system was electrified? A.—No.

Q.—You might just state this, Mr. Nix. Is it a fact that when this present company took over the old system from the city, the ultimate motive power to be used by the company was not decided upon? A.—No, sir, I think not.

Q.—They were supposed to use the best motive power available, horses, compressed air and electricity? A.—Yes, sir.

MR. INGRAM—That is in the conditions?

MR. OSLER—Yes, in the conditions, until this was made into a trolley system. Until this trolley system was installed, the old conditions prevailed, Mr. Nix? A.—The old conditions prevailed.

WILLIAM NIX (*examination and cross-examination*).

Q.—Now, as to the dealing with the snow. Now, during the early part of the operation of this system by this company, was there any taking away of the snow and depositing it in other streets? Was that practice adopted? A.—Yes.

Q.—I think that I can recollect the removing of the snow by carts? A.—Yes.

CHAIRMAN—After the new company was formed or before? A.—I think both before and since.

MR. INGRAM—Does that mean before this company was formed?

MR. OSLER—Before and since; it was the practice to take snow away and deposit it in other places.

MR. INGRAM—After it was electrified?

MR. OSLER—More since, but it was done while the system was operated by horses, Mr. Nix? A.—Yes, sir.

Q.—Paid by this company; no, not by the company, by the city? A.—Yes.

Q.—Removed by the city and deposited on other streets? A.—Yes.

Q.—That will do.

WILLIAM NIX cross-examined by MR. FULLERTON:—

Q.—Do you know who paid for this removal? A.—Not from my own knowledge.

Q.—Would you swear that there was none removed by the company? A.—I would.

Q.—Your recollection is that there was none removed by the company? A.—Yes, sir; not in the manner described by Mr. Osler.

Q.—In those days, when the snow began to get deep, cars were taken off and the sleighs were put on? A.—Yes, when the snow became too heavy for us to cope with it with our sweepers.

Q.—The difficulty was solved in those days by taking off the cars and putting on the sleighs? A.—Yes, sir.

Q.—Was the track dug out in spring time, or did you wait until it thawed out? A.—I beg your pardon, sir.

Q.—In the springtime, when you wanted to get at your tracks, was the snow carted away? A.—Yes.

Q.—Did the company do that? A.—Never.

Q.—Did not the company dig out the tracks and put away the sleighs, and cart away the snow? A.—They dug them out.

Q.—Did they cart away the snow? A.—No, sir.

Q.—Have you looked at the pay sheets? A.—No, sir.

Q.—Will you please look at them, and let us know who paid for it? A.—I will.

MR. FULLERTON—That is all the evidence for to-day.

Adjourned until Tuesday, April 16th, A.D. 1907.

Hearing resumed April 16th, A.D. 1907.

PRESENT:

JAMES LEITCH, Esq., K.C., Chairman.
ANDREW B. INGRAM, Esq., Vice-Chairman.
H. N. KITTSON, Esq., Commissioner.
J. S. FULLERTON, Esq., K.C., and MR. JOHNSTON, Counsel for the Applicants
H. S. OSLER, Esq., K.C., Counsel for the Respondents.

MR. OSLER—The letter that I wanted to complete this correspondence has not been found yet, but the argument that I should address to your Honors is quite apparent, I think, from

the rest of the letters. The correspondence that I wish to put in is for the purpose of assisting your Honors.

MR. FULLERTON—What is the date?

MR. OSLER—The first of December, 1891, and it was for the purpose of showing the view which the parties took of this contract at the very beginning. My argument is that they made a clear distinction between the sweeping and the spreading, and that the word deposit, the removal of snow, had reference to the taking away of the snow by carts from the streets with the tracks on. Now, in 1891, Mr. Cunningham, the City Engineer, wrote as follows. (Here Mr. Osler reads the same.) Then the next letter is the 17th of December of the same year, 1891, between the same parties. (Mr. Osler reads same.) Then in reply to it the manager—.

CHAIRMAN—The one of the 17th?

MR. OSLER—Your letter says, "Your two favors of the—.

CHAIRMAN—What is the date of the reply?

MR. OSLER—The 19th. There may be another letter that we have not got. This is what the letter says. (Mr. Osler reads the same.) Then on the 15th of January, 1892, the next year, the City Engineer writes. (Mr. Osler reads the same.) Then on the 19th there is a reply to that. (Mr. Osler reads the same.) That closes that correspondence apparently. Then on the 4th of February, the following month, 1892, the City Engineer writes again, re snow on streets. (Mr. Osler reads same.) I do not see any answer to that letter.

MR. FULLERTON—I suppose that that charge is for removal.

MR. OSLER—That is what I would suppose so. The next is on the 19th of February, from the City Engineer, re snow removal. (Mr. Osler reads same.)

MR. INGRAM—Is that in 1892?

MR. OSLER—Still 1892. On February 20th, the same year, there was a reply; no, I do not know where that went. The next letter on the file is a letter to E. J. Bird, Assistant Superintendent of the Toronto Railway Company. Mr. Bird, are you Mr. E. J. Bird?

MR. BIRD—No, sir.

MR. OSLER—This is an order from the Assistant Superintendent to look after that matter. It did not pass between the parties. Then the next that I have is from the Secretary-Treasurer referring to some meeting, the negotiations about the agreement.

MR. FULLERTON—There was a temporary agreement made in 1892, which was made for 1893, but actually continued in force until the new agreement was made.

MR. OSLER—We are not concerned with that.

MR. FULLERTON—Perhaps we are.

MR. OSLER—Now, on the 18th of February, Mr. Keating comes into the correspondence as City Engineer, after Mr. Cunningham had left, and he wrote as follows, re snow on Sherbourne Street. (Mr. Osler reads same, and draws attention of the Board to the fact that that letter shows that one is missing.) That is the reason that I want that letter. I have not found on my file any such letter. The dates have misled me. We have passed from 1892 to 1893. This letter is 1893. The matter apparently dropped since the last letter I put in in 1892.

MR. INGRAM—The letter you referred to is December 10th, 1892?

MR. OSLER—Yes. The missing letter is apparently a letter specifying the places where the snow is to be taken off the tracks and deposited in the places named in the letter. Now that letter being missing, the next is a letter on February 18th, 1893. (Mr. Osler reads same.) Then there is one more letter that relates to this. Mr. Keating writes again on February 20th, 1893. (Mr. Osler reads same.) Now this concludes the correspondence on this point.

Correspondence put in by Mr. Osler and marked Exhibit 1R.

CHAIRMAN—Any reply, Mr. Fullerton?

MR. FULLERTON—Yes, just a moment. Then I suppose that you referred to the old agreement. I had a copy made from it of the only clause that refers to snow removal, that deals with snow.

MR. OSLER—I only referred to it as it appeared in the correspondence.

MR. FULLERTON—You gave evidence as to the dealing with the snow under the old agreement.

MR. OSLER—Yes.

MR. FULLERTON—I have had a copy of the only clause in the old original agreement, that deals with snow, made. It is a very short one, and it is hardly worth while troubling your Honors with the old agreement, which is a very lengthy one. This is the clause: "When the accumulation of snow or ice on the railway shall be such as to impede the traffic, every means shall be used to clear the track, and, while impeded, sufficient sleighs shall be provided for the accommodation of the public."

This extract put in by Mr. Fullerton, and marked Exhibit 3A.

MR. FULLERTON—There was an agreement made in 1893 between the parties, under which the snow was removed. It was an agreement for 1893, but continued until the cancelled agreement.

CHAIRMAN—Until 1897.

MR. FULLERTON—The first is a letter to the company. (Mr. Fullerton reads same.)

MR. INGRAM—What is the date?

MR. FULLERTON—March 13—no, February 27th, 1893.

CHAIRMAN—What is the date?

MR. FULLERTON—February 27th, 189 is the date of the letter. Then there is the extract of the Committee on Reports adopted in 1893. (Mr. Fullerton reads same.) This and the letter put in by Mr. Fullerton, and marked Exhibit 4A.

MR. OSLER—By admitting that document, I suppose that I am bound to object to it on the same grounds as I objected to the subsequent agreement, that it could not affect the terms of the agreement. It says that it does not. It seems to me that this agreement is entirely in favor of the contention of the company, because it shows that there was no attempt made to prevent the use of the sweeper at that time, and it deals with the question of the removal of snow and ice from the streets.

CHAIRMAN—It was evidently contemplated to use the sweeper as well as the plow.

MR. OSLER—And it does not say anything about not using the sweeper.

MR. FULLERTON—I have Mr. Jones here to show that the accounts were paid.

MR. OSLER—I suppose that we did everything that we were called upon to do. I admit the fact.

MR. FULLERTON—Then I suppose, Mr. Nix, that there were no payments made by the city. You will probably admit that you were mistaken.

MR. NIX—I made enquiries, but he had no recollection of it.

MR. FULLERTON—What time did you go back to?

MR. NIX . asked him if he had any recollection at all.

MR. FULLERTON—Before 1897, and you found that you had not any?

MR. NIX—No.

JOHN JONES called, and sworn, to MR. FULLERTON:—

Q.—You were in charge of the streets under the Street Commissioner in 1891?

MR. OSLER—I take the objection formally that the agreement specified is not to prejudice the rights of the parties, and anything done under it cannot be evidence affecting the interpretation of the agreement.

agreement folded

JOHN JONES (*examination continued*).

MR. FULLERTON—I would not accept that view.

MR. OSLER—Surely in carrying out an agreement, what is done in pursuance of it cannot affect the parties'—.

MR. FULLERTON—As to what may have been the parties' interpretation, it is along the same lines as the letters.

MR. JONES to MR. FULLERTON:—

Q.—We rendered accounts rendered from time to time under that agreement of 1893? A.—Yes, sir, and prior to that.

Q.—You mean from the time the present company took the system over? A.—Yes.

Q.—The trolley cars followed after that? A.—Yes.

Q.—From the time that they took it over and up to the agreement of 1897, accounts were rendered? A.—Yes.

Q.—Have you these accounts in your books? A.—Yes.

Q.—You have made them out? A.—No, sir; I had not time to make them out.

MR. FULLERTON—That is the reply. I will endeavor to get that letter for you, Mr. Osler. Now I understand the circumstances.

MR. OSLER—In turning over these letters just now, something struck me that I had forgotten. There are two other letters, one is a letter of February 23rd, 1893, from Mr. Keating. I put this in because it is the first reference that we have to the use of the electric sweeper. (Mr. Osler reads same.) Then on December 12th, 1893, there is another letter, which I put in because it may be argued, although the letter does not expressly say so, that the fall was more than six inches. The letter says that there was a heavy snowfall. (Mr. Osler reads same.)

CHAIRMAN—Attach those letters to Exhibit 1R.

This concludes the evidence herein.

EXHIBIT 3A.

Extract from agreement dated 26th March, 1861, between The Corporation of the City of Toronto and Alexander Easton of the Village of Yorkville:

"Fourteenth.—When the accumulation of snow or ice on the railway shall be such as to impede the traffic, every means shall be used to clear the track, and, while impeded, sufficient sleighs shall be provided for the accommodation of the public."

EXHIBIT 1R.

Toronto, Dec. 1, 1891.

H. A. EVERETT, Esq.,
General Manager Toronto Railway.

SNOW CLEANING FROM STREETS.

Dear Sir,—During the last snow storm we had I saw your 12 horse sweeper in operation and it seemed to work well. I noticed that in the streets you swept with it, it cleaned off the snow in a smooth and even manner, leaving none of it piled on the devil-strip. It is very important when cleaning away the snow from the streets after a heavy fall, that none of it be left to pile up on the devil-strip between the tracks, as it is liable to freeze and become a solid barrier to traffic.

Yours truly,

GRANVILLE C. CUNNINGHAM,
City Engineer.

Toronto, Dec. 17, 1891.

H. A. EVERETT,
General Manager Toronto Railway.

SNOW CLEANING ON STREETS.

Dear Sir,—When your men clean off the snow from the streets, either by the sweeper or the plow, after our crossings have been swept and cleaned, it will be necessary for you to have some men following the sweeper or plow to re-sweep these crossings where covered with snow through operations of your men.

Yours truly,

GRANVILLE C. CUNNINGHAM,
City Engineer.

Dec. 19th, 1891.

GRANVILLE C. CUNNINGHAM, Esq.,
City Engineer.

Dear Sir,—Your two favors of the 17th inst. at hand, in regard to sweeping the crossings after the snow sweepers, and in regard to the Church Street service. The crossings will be kept clear of snow after the sweeper, and I will try to meet your wishes in the Church Street service, but you will hear from me in this connection later on.

Yours very respectfully,

H. A. EVERETT,
General Manager.

Toronto, Jan. 15, 1892.

H. A. EVERETT, Esq.,
General Manager Toronto Railway, Toronto.

SNOW CLEANING FROM STREETS.

Dear Sir,—In cleaning the snow from your tracks on the city streets, you must be careful not to throw it on to the roadway or crossings so as to form a ridge of obstruction to traffic. Also please see that the ridge in the centre of the street does not form too high, or in such a way as to prevent sleighs crossing from one side of the road to the other with convenience.

Yours truly,

GRANVILLE C. CUNNINGHAM,
City Engineer.

Jan. 19, 1892.

GRANVILLE C. CUNNINGHAM, Esq.,
City Engineer.

Dear Sir,—Your favor of the 15th inst. in regard to snow cleaning at hand, and contents carefully noted. We shall do everything in our power to cause as little trouble as possible to the public. I have been pretty much all over the city to-day looking after the work personally, and found that the men had done very well, except in some places where the pavement has bulged from the action of the frost, causing a high ridge in the centre of the street. Of course it is necessary for us to accommodate our patrons with as little trouble as possible, and we will try to adjust these matters entirely satisfactory to yourself.

Yours respectfully,

H. A. EVERETT,
General Manager.

Toronto, Feb. 4, 1892.

H. A. EVERETT, Esq.,
General Manager Toronto Railway.

SNOW ON STREETS.

Dear Sir,—I wish you could adopt some general system that would enable you to level off the snow that is thrown up by your snow plows on the street crossings after every snow storm. There are constant complaints made by the citizens about the crossings being blocked with a ridge of snow. Ultimately, I have no doubt, you get these ridges removed by various means, but the complaint of the citizens is that the ridge is left there for a long time before removal takes place. Mr. Jones' men have removed a considerable quantity of snow and ice at street intersec-

tions where there are curves, because at these places in particular your plow throws up snow so as to practically block the street. We have some charge to make against your company in connection with this. There are certain points where I myself noticed this to be very bad. At the corner of Bloor and Yonge Streets, and Bloor and Sherbourne Streets in particular. I trust you will have this work better attended to, as neglect is certain to cause trouble and annoyance.

Yours truly,

GRANVILLE C. CUNNINGHAM,
City Engineer.

Toronto, Feb. 19, 1892.

H. A. EVERETT, Esq.,
General Manager Toronto Railway.

SNOW CLEANING FROM STREETS.

Dear Sir,—Will you please in future see that the devil-strip between the tracks of your company is kept free of snow and ice. When you do the sweeping of the streets, you must also sweep this part. It is not the business of the city to keep it clear. I have told Mr. Jones to see that the blocks that are on the devil-strip are taken out. Also please be careful, when sweeping the streets, not to throw up an accumulation of snow at the street intersections or crossings, as trouble always arises from this.

Yours truly, GRANVILLE C. CUNNINGHAM.
City Engineer.

December 10, 89

TORONTO RAILWAY CO., Toronto.

REMOVAL OF SNOW AND ICE FROM TRACKS AND STREETS.

Gentlemen,—As the season is so far advanced that we may expect at any moment to have a fall of snow, I beg to send you a list of places at which the snow and ice removed from your tracks may be deposited, viz.:

Dufferin Street wharf,
Foot of Berkeley Street,
Lake Shore Road,
Esplanade, between York and Yonge Streets,
Foot of Leslie Street,
Don Improvement, north of Gerrard Street,
Foot of Simcoe Street,
Avenue Road, just north of Davenport Road, in the hollow,
Princess Walk, south side Front Street, between Bathurst and Spadina Avenue,
Rosedale Ravine, from Sherbourne to Yonge Street.

I must ask you to give your special attention to the requirements of clauses 21 and 22 of your contract with the city, and whenever the fall of snow or the accumulation of snow or ice, or both, at any point, is more than six inches in depth, to be careful to see that the whole space occupied by your tracks is at once cleared and the snow or ice removed to any of the places indicated above.

Yours truly,

E. H. KEATING,
City Engineer.

Toronto, Feb. 18, 1893.

TORONTO RAILWAY CO., Toronto.

SNOW ON SHERBOURNE STREET.

Dear Sir,—Serious complaint has been made regarding the dangerous condition of Sherbourne Street by reason of the snow which your employees have thrown off your tracks on to the side of the street. I must ask you to be good enough to at once, on receipt of this letter, have all the snow that has been thrown off your tracks removed from the street and deposited in any of the places named in my letter to your company of date December 10, 1892.

Yours truly,

E. H. KEATING,
City Engineer.

February 20, 1893.

TORONTO RAILWAY CO., Toronto.

SNOW ON BATHURST, BLOOR, M'CAUL AND CHURCH STREETS.

Gentlemen,—As complaint has been made regarding the snow which you have thrown off your tracks on to the sides of the above named streets, thereby making travel on the said streets dangerous, I beg to notify you to remove all of said snow from the streets and deposit it in any one of the places named in my letter to your company of the 10th December last. In case any accident should occur on any of these streets by reason of your neglect to attend to this notification, your company will be held strictly responsible.

Yours truly,

E. H. KEATING,
City Engineer.

Toronto, Feb, 23, 1893.

JAMES GUNN, Esq.,
Supt. Toronto Railway Co., City.

ELECTRIC SWEEPER—DUBOIS COMPLAINT.

Dear Sir,—Herewith I send you a letter written me by his Worship the Mayor, and also a letter from Mr. Dubois, concerning the manner in which the employees of your company operate the electric sweeper on the streets of the city during the day. I do not think this sweeper should be operated on the streets in the day time, except in cases of necessity, as horses are so apt to be scared by it and serious accidents thereby caused. The sweeper should be run, as far as possible, at night; but when it must of necessity be run in the day time, I would feel obliged if you would instruct your men to be as careful in its operation as possible. Please return enclosures with your reply.

Yours truly,

E. H. KEATING,
City Engineer.

December 12, 1893.

TORONTO RAILWAY CO., Toronto.

SNOW FROM TRACK ALLOWANCES.

Gentlemen,—I wrote you on the fourth inst. respecting the removal of snow from the track allowances and specifying the points where such snow could be deposited when removed from the streets. As there has been a heavy fall of snow during last night, and I notice this morning that you have simply swept off the snow from the track allowances and piled it upon the sides of the streets, I hereby notify you to have the same removed and deposited in any of the following places that may be convenient for yourselves:

Dufferin Street wharf,
Lake Shore Road, west of Indian Road, 30 feet south of road,
Foot Leslie Street,
Foot of Morse Street.

I must also notify you that in any future snow falls that may be, or accumulations of ice on the track allowances during the present winter .the snow and ice must be removed from the streets and deposited in any of the above named places that you may yourselves select, in accordance with the term of your agreement with the city.

Yours truly,

E. H. KEATING,
City Engineer.

EXHIBIT 4A.

Extract from Report No. 6 of the Committee on Works, adopted in Council without amendment, March 13th, 1893.

"CLEANING SNOW FROM STREETS.

Your Committee beg to recommend the adoption of the following report of the City Engineer re the above:

I beg to submit for the information of the Committee a copy of an agreement which has been entered into by Messrs. Bain, Laidlaw & Co., on behalf of the Toronto Railway Co., concerning the cleaning of snow, ice, etc., from the streets of the city upon which the tracks of the railway company are laid, and I recommend that the City Treasurer be instructed to collect from the Toronto Railway Company their proportion of the cost of such work which the agreement provides to be paid by them (viz., one-third) upon the presentation of statements of cost to him from time to time by the Street Commissioner.

Toronto, February 27th, 1893.

E. H. KEATING, Esq., C.E., City Engineer, Toronto:

RE REMOVAL OF ICE AND SNOW FROM STREETS.

Dear Sir,—In pursuance of the verbal arrangement for the removal of the snow, ice, etc., from the streets upon which the tracks of the railway company are now laid, we consent, on behalf of the company, that the Street Commissioner may remove the snow, ice, etc., from the streets in order to make the same reasonably safe for public travel, and that the Street Commissioner shall make a return of the cost to the City Treasurer, and the Railway Company shall pay one-third thereof on request. The railway company stipulate that the Street Commissioner shall consult with the Superintendent of the railway company about the removal of snow, ice, etc., and he shall consider the views of the Superintendent in reference thereto, but the Street Commissioner shall have the discretion of the quantity of snow, ice, etc., to be removed, and the manner of removal, in the event of any difference of opinion between him and the Superintendent. It is also understood that this agreement shall only relate to the removal of snow for the present winter, and that it shall not affect or prejudice the rights or liabilities of either party under the terms of the original agreement.

Yours truly,

(Signed) BAIN, LAIDLAW & Co.

After consultation with the Chairman of the Board of Works, and with his approval, I concur in the above arrangement.

(Signed) E. H. KEATING,
City Engineer."

EXHIBIT 1A.

AGREEMENT AS TO REMOVAL OF SNOW.

THIS INDENTURE made the nineteenth day of February, in the year of our Lord one thousand eight hundred and ninety-seven.

BETWEEN

THE TORONTO RAILWAY COMPANY, hereinafter called the Company,

Of the First Part,

AND

THE CORPORATION OF THE CITY OF TORONTO, hereinafter called the Corporation,

Of the Second Part.

WHEREAS by clauses numbers 21 and 22 of the conditions annexed to the agreement entered into between the said Corporation and George Washington Kiely, William Mackenzie, Henry Azariah Everett and Chauncey Clark Woodworth, and which agreement is attached to the Act of the Legislature of Ontario incorporating the said company, being 55 Victoria, Chapter 99, it is provided that the track allowances shall be kept free from snow and ice at the expense of the purchaser, so that the cars may be used continuously, and that if the fall of snow is less than six inches at any one time, the purchaser must remove the same from the tracks and spaces thereinafter defined, and shall, if the City Engineer so directs, evenly spread the snow on the adjoining portions of the roadway; but should the quantity of snow or ice, etc., at any time exceed six inches in depth, the whole space occupied as track allowance (namely, for double tracks sixteen feet six inches, and for single tracks eight feet three inches) shall, if the City Engineer so directs, be at once cleared of snow and ice, and the said material removed and deposited at such point or points on or off the street as may be ordered by the City Engineer; and by section 25 of the said Act, it is provided that whereas doubts have arisen as to the construction and effect of sections 21 and 22 of the said conditions, it is hereby declared and enacted that the said Company shall not deposit snow, ice or other material upon any street, square, highway or other public place in the City of Toronto without having first obtained the permission of the City Engineer of the said city, or the person acting as such;

AND WHEREAS the use of an electric sweeper has been ascertained to be a convenient mode of sweeping the snow from the track allowance and throwing it on the adjoining portions of the roadway, and the said Company have requested permission to use the same; and the said Corporation have consented to its use upon the terms and conditions herein set out;

AND WHEREAS the Ctiy Engineer by these presents and for the purposes of this agreement, has permitted the deposit of snow as aforesaid by the electric sweeper on the adjoining portions of the roadway, and the Corporation have agreed with the Company to remove and carry away from the adjoining portions of the roadway from time to time such quantities of the accumulated snow and ice as the Corporation, acting through their proper officials, shall think necessary in order to keep and maintain such portions of the roadway in repair in pursuance of the obligations of the municipal law;

NOW THIS INDENTURE WITNESSETH that the Corporation and the Company mutually and respectively covenant and agree with each other:

1. That the Company may use an electric sweeper or sweepers upon the track allowances of the railway for the purpose of sweeping the snow from the track allowances, and throwing it on the adjoining portions of the roadway between the track allowances and the curb or sidewalk, such sweeper or sweepers to be used in a reasonable and proper manner for the sweeping of snow during a fall, and within twenty-four hours thereafter, and for no other purpose and at no other times, and the same is to be operated in a manner satisfactory to the City Engineer, and so as not to throw, scatter or deposit snow or other material upon the sidewalks.

2. That the Corporation will from time to time, as the Street Commissioner acting under the authority of the City Engineer shall deem necessary, remove and carry away from the adjoining portions of the roadway, including intersecting streets, such quantities of the accumulated snow and ice as shall be deemed necessary in order to keep and maintain the said portions of the roadway in repair, as required by section 531 of the Consolidated Municipal Act and amendments thereto, and shall keep accounts of the outlay and expenditure incurred for that purpose, showing streets, names of men, time and rate of wages, and shall render an account thereof weekly to the Superintendent of the Company, which accounts shall be open to inspection by the said Superintendent; two-thirds of such expenditure to be paid and borne by the Corporation, and one-third thereof by the Company. Provided always, and it is hereby declared covenanted and agreed between the Corporation and the Company, that the Superintendent of the Company shall have the right to consult the City Engineer or the Street Commissioner as to the necessary work to be done in the removal of snow and ice, and to lay before the City Engineer or Street Commissioner his opinion in regard to such removal and the quantity to be removed, and the manner of removal; but in the event of any difference of opinion between the City Engineer or Street Commissioner and the Superintendent, the City Engineer or Street Commissioner shall, after consideration of the opinions of the Superintendent, exercise his own discretion and judgment, and the Company shall in all cases be liable for one-third of the said expense incurred by the city for such removal.

3. And that in case of heavy falls of snow and necessity for quick removal of accumulations at crossings or other places, the Company through its Superintendent may, with the consent of the City Engineer or Street Commissioner, assist in the removal of accumulations of snow and ice, and in such case shall keep accounts of the outlay and expenditure incurred by him for that purpose, and render such accounts, certified as to correctness by the Superintendent of the Company, weekly, to the City Engineer or Street Commissioner, showing streets, names of men, time and rate of wages, such expenditure to be paid and borne as aforesaid.

4. That the Company will operate the said electric sweepers with reasonable and proper care and will not throw or scatter snow on sidewalks, and immediately after the use of the sweepers will evenly spread the snow thrown from the track allowances over the adjoining portions of the roadway between the track allowances and the curb or sidewalk, and will remove from the sidewalks and crossings all snow deposited thereon by the use of the said sweepers.

5. That the Company will pay to the Corporation through its City Treasurer, weekly, after the rendering of the said accounts, one-third of the outlay and expenditure incurred by the Corporation in the removal of accumulations of snow and ice as aforesaid, and in the event of default for ten days will pay interest thereon.

6. (1) That the Company assumes and becomes liable as between the Corporation and the Company for all damages recoverable or recovered by any person or persons for injuries to

persons or property caused by the use of the electric sweepers or caused by the accumulations of snow or ice upon the streets between the curb and curb from the natural fall, from the snow thrown from the sidewalks, drains, street gullies, gutters and cross-cuts and from the track allowances, or from any failure to remove or carry the same away; but such liability shall not extend to the existence of any drains, street gullies, gutters or cross-cuts opened by the city, or the omission or neglect of the city to open the same, or to the act of other persons or corporations depositing upon the street wherever the tracks of the Company are situated, snow or ice removed from other streets or properties.

(2) In the event of any claim being made by any person or persons against the Corporation for damages as aforesaid, prompt notice thereof shall be given to the Superintendent of the Company or left at his office, and if the claim is disputed by the Company and an action is brought against the Corporation to recover damages, the writ of summons or process served on the Corporation shall be delivered to the Superintendent of the Company, and the Company shall be entitled, if they dispute the claim, to defend the action in the name of the Corporation, and to plead all grounds of defence which might have been pleaded by the Corporation.

(3) That the Company will pay all final judgments for damages and costs recovered in any such actions, and will protect, indemnify and save harmless the Corporation therefrom.

7. Provided always that nothing herein contained shall enlarge the liability of the Corporation beyond what it now is.

8. It is further understood and agreed by and between the Corporation and the Company that these presents shall be operative for the winter of 1896-7, and afterwards until thirty days' written notice shall be given by the Corporation or the Company during any year before the first day of November for the cancellation thereof, and upon service of such notice at the expiration of the period of thirty days these presents shall cease and be void, and the Corporation and the Company shall thereby be restored to the original position, rights and obligations under the agreement between the Corporation and the Company, and the explanatory legislation.

IN WITNESS WHEREOF the Corporation and the Company have hereto set their respective seals under the hand of the proper officials.

SIGNED, SEALED AND DELIVERED by the Corporation in the presence of

CHARLES CURTIS.

(Seal)

(Signed) F. L. WANKLYN,
Manager.

(Seal)

(Signed) J. E. GRACE,
Secretary-Treasurer.

(Signed) R. J. FLEMING,
Mayor.

(Signed) R. T. COADY,
Treasurer.

EXHIBIT 2A.

Toronto, Oct. 1st, 1906.

His Worship Mayor Coatsworth,
City Hall, Toronto.

Dear Sir,—The Toronto Railway Company hereby gives notice of the cancellation of the agreement between the Company and the Corporation of the City of Toronto, dated the 19th day of February, 1897, being an agreement relating to the removal of snow and ice, and other matters, such cancellation to become effective upon the expiration of thirty days after the receipt of this letter.

This notice is given pursuant to paragraph 8 of the said agreement, which provides that the same shall be operative until 30 days' written notice shall be given by the Corporation or the Company during any year before the 1st day of November for the cancellation thereof.

I shall be glad to take up with you, or wtih any duly authorized representative of the Corporation, any questions that may arise in consequence of the cancellation of the said contract as above stated, or, if the City prefers, as to any questions which may come within the jurisdiction of the Railway Commission, I shall be glad to discuss the same before the Commission.

Yours faithfully,

The Toronto Railway Company,
Per Robert J. Fleming,
General Manager.

REASONS FOR JUDGMENT OF THE BOARD.

THE ONTARIO RAILWAY AND MUNICIPAL BOARD.

BETWEEN

THE CORPORATION OF THE CITY OF TORONTO,

Applicants,

AND

THE TORONTO RAILWAY COMPANY,

Respondents.

JUDGMENT IN SNOW CASE.

The applicants allege by virtue of paragraphs Nos. 21 and 22 of the conditions attached to the agreement between the City of Toronto and George W. Kiely and others, dated the first day of September, 1891, as interpreted by section 25 of 55 Vic. Cap. 99, that the respondents shall not deposit snow, ice or other material upon the sides of the streets upon which the respondents' railway tracks are laid, without having first obtained the permission of the City Engineer, or the person acting as such, and that in violation of such agreement and legislation, and without having obtained the permission of the City Engineer, the respondents have deposited during the past winter snow, ice and other material upon the sides of the streets of Toronto upon which the street railway tracks are laid. The applicants ask that the Toronto Railway Company may be ordered to desist from throwing snow, ice and other material upon the said streets without the permission of the City Engineer first had and obtained.

Paragraphs 21 and 22 of the conditions and section 25 of the Act read as follows:

"21. The track allowances (as hereinafter specified), whether for a single or double line, shall "be kept free from snow and ice at the expense of the purchaser, so that the cars may be used "continuously; but the purchaser shall not sprinkle salt or other material on said track allowances "for the purpose of melting snow or ice thereon without the written permission of the City "Engineer, and such permission shall in no case be given on lines where horse power is used.

"22. If the fall of snow is less than six inches at any one time, the purchaser must remove "the same from the tracks and spaces hereinafter defined, and shall, if the City Engineer so "directs, evenly spread the snow on the adjoining portions of the roadway; but should the "quantity of snow or ice, etc., at any time exceed six inches in depth, the whole space occupied as "track allowances (viz., for double tracks sixteen feet six inches, and for single tracks eight feet "three inches), shall, if the City Engineer so directs, be at once cleared of snow and ice and "the said material removed and deposited at such point or points on or off the street as may be "ordered by the City Engineer.

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"Sec. 25. And whereas doubts have arisen as to the construction and effect of sections 21 "and 22 of the said conditions, it is hereby declared and enacted that the said Company shall "not deposit snow, ice or other material upon any street, square, highway or other public place "in the City of Toronto, without having first obtained the permission of the City Engineer of "the said City, or the person acting as such."

It is admitted that the deposit of snow and ice complained of was made during the winter of 1906-1907 upon the sides of the streets upon which the Company's tracks are laid, by means of an electric sweeper; that the fall of snow at any one time was less than six inches, and that the sweeper was used by the Company without the permission of the City Engineer. The respondents, the Company, contend that the brushing of the snow by the sweeper from their tracks to the sides of the streets upon which the tracks are laid is not depositing snow on such streets within the meaning of clauses 21 and 22 of the agreement, as interpreted by section 25 of 55 Vic. Cap. 99. Mr. Fullerton in his argument urged that the Company was debarred by section 25 from removing the snow from their tracks and depositing it, even temporarily, on the sides of the streets on which the tracks are laid, without having first obtained the permission of the City Engineer or the person acting as such. If Mr. Fullerton is right in his argument, then a sweeper could not be used, for the reason that its operation involves putting the snow on the sides of the roadway adjoining the tracks. That is what it means if the City's contention prevails. In operating a street railway in a climate so variable, where storms are sudden and sometimes severe, the Board consider it unreasonable to insist upon the Company first getting the permission of the City Engineer or anyone else before using their appliances for fighting snow.

Condition 22 provides that if the fall of snow is less than six inches at any one time, the Company must remove the same from the tracks and spaces, and if the City Engineer directs, evenly spread the snow upon the adjacent portion of the roadway. There is nothing said as to the implements or devices that may be used to keep the tracks free from snow and ice, so that the cars may be used continuously. The only prohibition is that the Company shall not sprinkle salt or other material on the track allowances for the purpose of melting the snow or ice thereon, without the written permission of the City Engineer. Irrespective of any question of direction, no matter whether the Engineer so directs or not, the Company are bound to keep the tracks free of snow and ice, so that the cars can be used continuously.

The object of first importance which the City had in view when making the agreement, was to secure a continuous car service. The removal of the snow from the tracks and spaces between the tracks was to attain that object. The matter of greatest moment was to secure the operation of the cars without interruption, no matter how heavy the fall of snow might be. The wisdom of this is obvious. The greater the fall of snow, the more severe the storm, the more necessary street car transit becomes to the public. The cars being run by electricity, the rails must be kept clear of snow, otherwise operation is impossible. A continuous car service during snow falls can only be obtained by the use of the electric sweeper, it being the only practicable means of clearing the tracks.

There is no stipulation as to what implement is to be used in clearing the tracks of snow and ice. When the agreement was made, both the snow plow and the sweeper had been in use, operated, it is true, by horse power, the same as the cars were at that time. The change of motive power was in contemplation when the agreement was entered into. That change has since been made, and electricity has been substituted for horse power. This change has made the electric

Compare with 22

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to have been or to be

sweeper a greater necessity than before for the removal, in the first instance, of snow from the rails, in order to secure the operation of the cars. Even in the case of a comparatively light fall, the snow getting between the wheels and the rails acts as a non-conductor and creates a short circuit, which may burn out the motors and in any case interferes with the operation of the car.

In the absence of any prohibition against the use of the electric sweeper, and in view of the local conditions and surrounding circumstances given in evidence, and of the necessity of combatting a snow storm promptly, and from start to finish, if the cars are to be run continuously, the Board are of the opinion that the Company can use such a sweeper to remove the snow from the tracks. Taking into account the documentary evidence and the surrounding circumstances proven, the Board are of opinion that sweeping the snow from the tracks to the side of the roadway upon which the tracks are laid is not depositing snow on such streets, within the meaning of the 21st and 22nd conditions of the agreement, as interpreted by section 25 of the Statute.

Section 63 of the Ontario Railway and Municipal Board Act, under which the City seek their remedy, is as follows: "63. (1) Where it is alleged by a municipal corporation having jur-"isdiction over, or owning, or maintaining a highway along which a railway is operated, in "whole or in part, under an agreement between such municipality and the company operating "the railway, that the company has violated or committed a breach of such agreement, or where "it is alleged by such company that such municipality has violated or committed a breach of "such agreement, the Board shall hear all matters relating to such alleged violation or breach "of agreement, and shall make such order as to the same as to it may seem, having regard to "all the circumstances of the case, reasonable and expedient, and in such order may in its dis-"cretion direct the company or the municipality to do such things as are necessary for the "proper fulfilment of such agreement, or to refrain from doing such acts as constitute a viola-"tion or a breach thereof."

In the exercise of their discretion, under section 63 of the Act, the Board decline, as asked, to order the Company to desist from sweeping the snow from the tracks and spaces in the first instance, to the adjoining portions of the roadway.

The first contingency that arises under Condition 22 is a fall of snow of less than six inches at any one time. This the Company must remove from the tracks and spaces, and shall, if the City Engineer so directs, evenly spread the snow upon the adjacent portions of the roadway. The removal is from the tracks. The spreading is to be done on the adjoining portions of the roadway. Removal from the adjoining part of the roadway is not provided for. The Board are of opinion that the reason that a removal from the roadway adjoining the track was not directed in this instance, was that the snow would be comparatively innoxious, and if spread evenly would be useful, in fact necessary, for sleighing. In sweeping the snow it must be confined to the roadway. The sidewalks and cross-walks form no part of what is called the roadway, within the meaning of this condition.

Mr. Fullerton argued that successive falls of snow of less than six inches at one time might create an aggregate of such depth as would become a menace to pedestrians and vehicles. The Company would incur that risk, and would no doubt be liable for damages by reason of accidents caused by an accumulation of snow, from successive sweepings of light falls of less than six inches becoming an obstruction to the ordinary use of the street by vehicles or pedestrians. It is not enough to say that the Company will be liable for damages in the event of an accident.

The Company must guard against accidents, so that the pedestrian and the driver of the vehicle, using ordinary care, will be safe. The Board in the exercise of their discretion think it reasonable and expedient, in order that pedestrians and vehicles may be protected, to direct that, when from the sweeping of successive falls of snow of less than six inches, to the roadway adjoining the tracks, the accumulation has attained a depth of six inches, that from that time forward the Company shall remove from the roadway adjoining the tracks, if ordered by the City Engineer, any further snow that they may sweep from the tracks, either to their own dumping ground, or to such street, highway or square as the City Engineer may direct.

The next contingency that has to be dealt with, and which is also involved in Condition 22, is where the quantity of snow or ice at any one time exceeds six inches in depth. In that case, if the City Engineer so directs, it must, first, be at once cleared off from the whole track allowance; second, the material must be removed; and third, it must be deposited. It will be observed in this contingency, where the fall is greater than six inches, that the directions are entirely different from the case where the fall of snow is less than six inches at any one time. If the snow and ice is over six inches in depth it must be cleared, must be removed, and must be deposited. By section 25 it cannot be deposited upon any street, square, highway or other public place in the City of Toronto, without having first obtained the permission of the City Engineer or the person acting as such. The fall of snow over six inches might be the first of the season, it might be ten inches or more, and the Engineer, in the exercise of his discretion, if it was cleared from the track allowance to the roadway adjoining the tracks, might not require it to be removed and deposited. He might consider it advisable to leave it where thrown by the sweeper for sleighing, but if he sees fit to do so, he can compel the Company to remove and deposit the whole fall, if over six inches.

The formal order will be drafted by the applicants and submitted to the respondents for approval, and if the parties fail to agree it can be settled by the Secretary. The trial will be treated by the Secretary as having occupied one day, and the stamps to be affixed to the order will be contributed in equal shares by the parties. The Board makes no other order as to costs and reserves further order and direction.

Dated this 23rd day of April, 1907.

JAMES LEITCH,
Chairman.

A. B. INGRAM,
Vice-Chairman.

H. N. KITTSON.

When depth 6 inches Company shall remove

where snowfall 6 inches

FORMAL ORDER OF THE BOARD.

THE ONTARIO RAILWAY AND MUNICIPAL BOARD.

BEFORE

JAMES LEITCH, Esq., K.C., Chairman.
A. B. INGRAM, Esq., Vice-Chairman.
H. N. KITTSON, Member.

Tuesday, the twenty-third day of April, 1907.

BETWEEN

THE CORPORATION OF THE CITY OF TORONTO.

Applicants,

AND

THE TORONTO RAILWAY COMPANY.

Respondents.

UPON the application of the above named applicants, in the presence of the applicants and respondents, upon hearing the evidence adduced in behalf of the applicants and respondents, and upon hearing counsel for the applicants and respondents:

1. THE BOARD dismisses the application of the above named applicants for the reasons given in the Judgment.

2. AND THE BOARD ORDERS that the stamps required for this order be contributed in equal shares by the parties, and makes no other order as to costs.

JAMES LEITCH,
Chairman of the Ontario Railway and Municipal Board.

(Seal)

Result

ORDER GRANTING LEAVE TO APPEAL

IN THE COURT OF APPEAL FOR ONTARIO.

Monday, the twenty-third day of September, 1907.

PRESENT

THE HONORABLE THE CHIEF JUSTICE OF ONTARIO,
THE HONORABLE MR. JUSTICE OSLER,
THE HONORABLE MR. JUSTICE GARROW,
THE HONORABLE MR. JUSTICE MACLAREN,
THE HONORABLE MR. JUSTICE MEREDITH.

IN THE MATTER OF AN APPLICATION BEFORE THE ONTARIO RAILWAY AND MUNICIPAL BOARD.

BETWEEN

THE CORPORATION OF THE CITY OF TORONTO,

(APPLICANTS) *Appellants.*

AND

THE TORONTO RAILWAY COMPANY,

(RESPONDENTS) *Respondents.*

UPON motion made on the 3rd day of June and the 16th day of September, 1907, unto this Honorable Court, on behalf of the above named appellants, upon reading the Notice of Application, the affidavit of William Johnston, filed, and the exhibits therein referred to, the evidence, pleadings and proceedings before the said Board, and the Reasons for Judgment of the said Board, and upon hearing counsel as well for the appellants as the respondents, THIS COURT WAS PLEASED TO DIRECT that the matter of the said application should stand over for judgment; and the same coming on this day for judgment,

IT WAS ORDERED that the appellants be at liberty to appeal from the decision or order of the said Board pronounced on the 23rd day of April, 1907, and that the costs of this application be costs in the cause.

(Signed) C. S. GRANT,
Assistant Registrar C. A.

REASONS FOR APPEAL.

1. Outside of the agreement granting the respondents their franchise and the statute validating same, the respondents had no right to remove snow from their tracks to the remainder of the street.

2. The said agreement neither in clauses 21 nor 22 thereof intended to give such right.

3. Section 25 of the validating statute (55 Victoria, Cap. 99) was enacted to make it clear that such right is not given both as to falls of less than and more than six inches in depth.

4. The parties recognized and recited this to be so and acted upon it in the agreement for snow removal, bearing date the 19th of February, 1897.

5. Unless upon undoubted language the municipality should not be held to have given away an important control over their streets.

6. The inhabitants that compose the municipality and the municipality are both interested in the continuous running of the cars, and it should not be assumed that they will unfairly or unreasonably attempt to prevent the tracks of the respondents from being cleared of snow.

7. The agreement that existed, if unfair, was unfair to the municipality, and the only unreasonableness shown so far is by the respondents in cancelling same. This cancellation was for the express purpose of forcing the municipality to pay a large portion of the cost of snow removal.

8. But for the trench made in removing snow from the tracks, the appellants would not require to do any snow cleaning from the roads.

9. Except upon parts of King Street, Queen Street and Yonge Street, there is no deposit of snow upon the paved portion of the streets from the sidewalks, and the amount removed from the tracks upon the roadway is the only cause for snow removal from the road.

10. The City should not be called upon to remove any of this snow, much less to pay two-thirds of the cost of such removal.

11. The action of the railway in cancelling the agreement and removing snow upon the streets by the sweeper was the assertion of a right, and the appellants were forced thereby to take steps to have the rights and obligations of the parties declared.

12. The appellants' contention has been recognized in the Supreme Court of Canada in:

Toronto v. Toronto Railway Co., 24 S.C.R., pages 591, et seq.

13. The Board in their Reasons for Judgment show that control of the street railway in the removal of snow was necessary, but refused to carry out such control.

JAMES S. FULLERTON,
Counsel for Appellants.

1 Judgment
order

1. Meaning of clause

2. use of word deposit in agmt
& provisions of agreement

p. 29 (3. Rehly
Cty. recognise case of
right to use

4. Case in Sup Court

3. The Judgment.

REASONS AGAINST APPEAL.

1. The respondents rely upon the agreement of 1st September, 1891, by which they purchased, for the considerations and upon the terms therein mentioned, the right to operate a street railway in the streets of the City of Toronto.

2. Prior to the making of the said agreement, a street railway was operated upon the streets of Toronto by a Company under an agreement with the City of Toronto, which did not compel the continuous operation of the cars throughout the winter, but permitted the Company, in the event of a considerable accumulation of snow, to replace their cars by sleighs, and one of the objects of the City of Toronto in entering into the said agreement with the respondents was that the cars should be operated continuously and the tracks kept clear of snow during the entire winter, and provision was therefore made in the agreement for the expense of removing snow when necessary.

3. The respondents therefore say that the questions raised by the appellants upon this appeal as to the reasonableness of the subsequent agreement which was cancelled, as to whether it is reasonable that the City should be called upon to pay any of the expense of snow removal, are irrelevant, all such considerations being dealt with by the contract and forming part of the consideration thereof, the sole question therefore being as to the rights and obligations granted and undertaken by the parties respectively upon the true interpretation of conditions 21 and 22 of the contract read in connection with section 25 of the Act of Incorporation of the Company, 55 Vict. Cap. 99.

4. The respondents say that in and by the said contract they undertook the following obligations and no others:

(a) At their own expense to keep the tracks clear of snow at all times.

(b) If directed by the City Engineer, at their own expense, to evenly spread upon the adjoining portion of the roadway the snow removed by them from the track allowances.

(c) In the event of a snowfall exceeding six inches at one time, and if then directed by the City Engineer to remove at their own expense such snowfall from the track allowance and to deposit it where the Engineer might direct.

5. The respondents submit that their right to sweep or otherwise remove snow from the track allowance to the adjoining portions of the roadway is clear upon the true interpretation of conditions 21 and 22 of the contract, and sec. 25 of their Act of Incorporation, for the following reasons:

(a) It is the only possible way of performing their obligations under condition 21, viz., to keep the tracks clear and at the same time operate the cars continuously.

(b) It is absurd to suppose that it was intended that trifling snowfalls should be immediately removed altogether from the street.

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No evidence of
there are two things to be Considered

(c) Snowfalls in excess of six inches are only required to be removed to other places if directed by the City Engineer, but must in any event be cleared from the tracks.

(d) The obligation to evenly spread the snow removed from the tracks presupposes a previous sweeping or removal by other means.

(e) The contract is to be read in the light of the circumstances existing at the execution thereof, and the evidence plainly shows that at the time of the execution thereof both plows and sweepers were in use upon the railway for the purpose of keeping the tracks clear of snow, and the respondents say that the provision of section 22 as to evenly spreading the snow upon the adjoining portion of the roadway was inserted for the reason that the result of the operation of the snow plow and of the comparatively ineffective sweeper then in use, was at times to leave the snow in ridges which required to be spread evenly over the roadway for the convenience of persons using the streets.

6. The respondents submit that the contention of the appellants is not aided by section 25 of the statute, which is confined to an assertion of the rights of the city with regard to the deposit of snow by the Company upon removal of a snowfall exceeding six inches, under the orders of the City Engineer, as provided in section 22.

7. The argument of the appellants is entirely based upon the contention that the act of sweeping snow from the track allowances to the remaining portions of the street is a deposit thereon of the snow so removed, the appellants then contending that no deposit can be made except by leave of the City Engineer, by virtue of section 25 of the Act. The respondents, on the other hand, submit that the word "deposit" is applicable only to a deposit of the snow which takes place after the removal from the street by means of carts, etc., of a fall in excess of six inches, that being the plain meaning of the word in section 22.

8. That the Company cannot fulfil the obligation of their contract without using plows, sweepers or similar contrivances is not denied by the appellants, whose avowed object in seeking to place an interpretation upon the contract which would prevent the Company from placing the snow removed by them upon the adjoining portions of the roadway, is to obtain a decision that would compel the Company to submit to terms dictated by the City as to payment of the expense of snow which the City might desire to have removed from the streets, irrespective of the amount of any snowfall, and outside altogether of the obligations of the contract.

9. Questions have been raised by both parties as to the interpretation which the parties themselves have put upon this portion of the agreement in question, and the appellants have referred to a recital in the agreement of February, 1897, to the effect that the Company had no right to use an electric sweeper without permission. In reply to this, the respondents submit that this was an agreement entered into for the considerations therein stated, and having been terminated as therein provided, it is not open to the City to make use of the recital referred to, and that in any event all that was meant by the said recital was that the electric sweeper in the particular form then in use might require the assent of the City before being used, and that it was never intended to admit the contention now set up by the appellants that the respondents have no right to sweep snow upon the side of the street; and the respondents further say that the said recital was a mere inadvertence in settling the terms of an agreement which was entered into for special reasons operative at the time, and which the respondents always regarded as unfair and subsequently cancelled.

not Correct

Why?

deposits

accused object

Excuse

10. The respondents further submit that the uniform interpretation placed upon the contract for many years after the execution thereof by both parties, and the practice of both parties as set forth in the correspondence (Exhibit 1R) shows that the right of the respondents to use plows and sweepers was admitted by the appellants and acted upon by both parties for many years.

DATED the 15th day of October, 1907.

H. S. OSLER,
Of Counsel for the Respondents.

not the right to use
but the use